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NO. 47

JOSEPH CHARLES DINER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND STEAMAN LINES, INC., *Respondents*

BRIEF AS AMICUS CURIAE IN THE ABOVE ENTITLED AND NUMBERED CAUSE

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Supreme Court of the United States

October Term, 1970

NO. 47

JOSEPH CHARLES USNER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC., *Respondents*

MOTION FOR LEAVE TO FILE ACCOMPANYING BRIEF AS AMICUS CURIAE IN THE ABOVE ENTITLED AND NUMBERED CAUSE

The American Trial Lawyers Association, by and through Arthur J. Mandell, of Mandell & Wright, Houston, Texas, a member of the Bar of this Court, and as a member of the Admiralty Section of the American Trial Lawyers Association, on behalf of the American Trial Lawyers Association, respectfully petitions this court for leave to file a brief amicus curiae on behalf of Petitioner herein, and if granted, for this Honorable Court to consider the argument of cases in point following this statement of interest.

INTEREST OF THE AMERICAN TRIAL LAWYERS ASSOCIATION—ADMIRALTY SECTION

The American Trial Lawyers Association is a national bar association consisting of more than twenty thousand lawyers primarily engaged in the practice of tort law. The Admiralty Section of this bar association consists of a substantial number of attorneys specializing in maritime law. Said association is vitally interested in the outcome of this case, involving as it does, the absolute and non-delegable duty to supply a seaworthy vessel no matter how and by whom the unseaworthiness causing injury was brought about. Any relaxing of such duty would severely impair the rights of this group of workers for whom the Congress and the courts have shown a genuine deep concern.[1]

It is of paramount importance to hundreds of thousands of this class of workers that the established legal principles as announced by this court remain unimpaired and undiluted by undefinable and ofttimes invisible lines destructive of the protection granted these workers, engaged as they are in the most hazardous of all industries.

The American Trial Lawyers Association has obtained and filed the written consents of counsel for all parties herein to file this brief as amicus curiae in support of Petitioner.

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1. The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate of seven times that of manufacturing. (1958 U.S. Code and Cong. News, p. 3843. Section 41 of the Act [33 U.S.C.A. § 941(a)]).

For the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief amicus curiae.

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For and in behalf of the American Trial Lawyers Association
(Admiralty Section)

Supreme Court of the United States

October Term, 1970

NO. 47

JOSEPH CHARLES USNER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC., *Respondents*

BRIEF AMICUS CURIAE OF AMERICAN TRIAL LAWYERS ASSOCIATION

PRELIMINARY STATEMENT

Respondent admits Petitioners' recitation of the factual posture of the case at bar. We, therefore, adopt Petitioner's statement of the facts which brought about his injuries. This amicus brief will limit its argument in support of this court's broad concept of the doctrine of unseaworthiness protecting all those engaged in the maritime industry who do work traditionally done by seamen.

Petitioner and Respondents have given their consent to the Admiralty Section of the American Trial Lawyers Association to file this amicus curiae brief. The written con-

sent of the parties have heretofore been filed with this Honorable Court.

It is the position of the American Trial Lawyers Association that this court's unbroken decisions since 1946, recognizing that longshoremen are entitled to the same statutory and traditional protection as seamen by necessity includes unseaworthiness brought about by the instantaneous negligence of a fellow longshoreman which some courts distinguish as operational negligence or instantaneous unseaworthiness.

It is respectfully submitted that the emergence of the Twentieth Century with its highly intricate machinery brought on by the technological revolution, exposes workers to many more dangers[1] compel that shadowy undistinguishable areas between momentary, transitory and/or instantaneous action creating unseaworthiness be completely eradicated, as indeed this court did in *Mascuilli v. United States,* 387 U.S. 237, 87 S.Ct. 1705 (1967). Failing to grant these workers such protection would upset the decisions of this court and in a great measure nullify their protection.

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1. "The committee notes that human failure undoubtedly contributes to many accidents, but usually other factors are involved. The record of accident reduction where safety standards are enforced conclusively refutes the contention that such procedures are not effective. To conclude otherwise is to disregard the affirmative results of safety legislation in this country accumulated over many years." (Senate Committee on Labor and Public Welfare, 85th Congress, Second Session Report No. 1788, July 1, 1958).

And see Congressman Borden's report on the House Committee on Education and Labor, 85th Congress, Second Session, Report No. 2887, July 28, 1958.

ARGUMENT AND AUTHORITIES

This court's decisions in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (1946); *Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455 (1944); *Alaska Steamship Co., Inc. v. Petterson,* 347 U.S. 396, 74 S.Ct. 601 (1954); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S.Ct. 202 (1953); *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 80 S.Ct. 926 (1960); *Waldron v. Moore-McCormack Lines, Inc.,* 386 U.S. 724, 87 S.Ct. 1410 (1967); and *Mascuilli v. United States, supra,* establishing the doctrine of unseaworthiness as a species of liability without fault, is firmly entrenched in the Maritime Law and applies to those shore workers who perform duties on board the vessel traditionally done or performed by seamen, *Pope & Talbot, Inc. v. Hawn, supra.* In the case at bar, like in *Mascuilli v. United States, supra; Crumady v. Joachim Henrik Fisser, et al,* 70 S.Ct. 445 (1959); *Grillea v. United States,* 232 F.2d 919 (2nd Cir. 1956, C.A.), and a host of others, the longshoremen misused seaworthy equipment, causing injuries. The shadowy distinction contended for by Respondent which would require negligent acts of a longshoreman to create a "condition" of some duration must not be permitted to dilute these workers' protections. Such unrealistic test is a throwback to the *Cookingham v. United States,* 184 F.2d 213 (1950), C.A. 3rd Cir.) and *Adamowsky v. Gulf Oil Corp.,* 93 F. Supp. 115 — affd. 197 F.2d 523 rejected by this court in *Mitchell v. Trawler Racer, Inc., supra.*

It is respectfully submitted that this court's decision in *Mascuilli v. United States, supra,* establishes that the misuse of seaworthy equipment by longshoremen can render the vessel unseaworthy or what is called operational negligence.

Perhaps the best example, supported by ample authority, would be the situation where one longshoreman drops some oil or grease on the deck and as he drops it another longshoreman steps backwards and slips on it, sustaining injuries. Undoubtedly a momentary occurrence. Yet, liability is imposed. *Pierce v. Erie Railroad Co.*, 165 F. Supp. 216; *Yanow v. Weyerhauser Steamship Co.*, 250 F.2d 74; *Oakes v. Graham Towing Co.*, 135 F. Supp. 485. There is no difference between the case at bar and Mascuilli, supra. In Mascuilli, the Trial Court found:

> "* * * the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. *The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or prevent its happening.*" (Emphasis ours)

On such finding, this court unanimously found liability. It is obvious in Mascuilli the fatal injuries occurred because of the negligence of a fellow longshoreman which, as the trial court found, "happened suddenly and without warning; he had no time to warn or instruct the winchman or the signalman-foreman before the accident occurred", substantially, like the case at bar.

Mascuilli decision is but a natural sequence of this court's rule which governs all cases involving workers who do work traditionally done by seamen. Thus, if a seaman on board a vessel would sustain the injuries which Petitioner here suffered, brought about by a fellow seaman's negligent handling of seaworthy ship's gear, there

would be no question that such unseaworthiness producing injury would impose liability.

This court, as far back as *Seas Shipping Co. v. Sieracki, supra,* has unequivocally held:

> "'* * * It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Co. v. Haverty, * * *' 3 Cir., 149 F.2d 98, 101."

And more particularly spelled out in the same case, 66 S.Ct. 880:

> "* * * It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and *statutory* protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." (Emphasis ours)

It is precisely because of this holding that the Fifth Circuit in *Flowers v. Savannah Machine & Foundry Co.,* 310 F.2d 135 (1962), speaking through Chief Judge Brown, reasserts the proposition that a longshoreman is entitled to the *statutory and traditional rights of seamen* by stating: (p. 139, 310 F.2d 135):

> "Of course, the *Sieracki*-seaman is not a real full-fledged seaman for all purposes. He has, for example,

> no claim for the traditional right to maintenance, wages and cure. But the law reasons that in doing the work essentially that of a seaman who is a regular crew member, such vicarious seamen are entitled to comparable, if not identical, protection and *sanctions.* * * *" (Emphasis ours)

In *Sieracki* the court addressed itself to the shipowner's obligations as follows:

> "* * * As we have said, he is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of a more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do."

This court's affirmance of the Circuit Court's decision in this case would run directly contrary to its holding that a shipowner may contract the work of loading or discharging its vessel by having it done with the advantages of more modern divisions of labor, he nevertheless cannot minimize the worker's hazards and should not nullify his protection, Sieracki, supra. Failure to adhere to this established rule would dilute this court's holding in Sieracki, page 876, wherein it said:

> "* * * And it would hardly seem consistent with the obligation's benevolent purposes that the owner might nullify it by the device of having all who man the

> ship hired by others willing to furnish men for such service at sea or ashore."

Respondent's argument, page 5-20 of its brief seeks to induce this court to turn back the clock and erase decades of progressive legislative intent and judicial decisions which takes cognizance if our dynamic and ever expanding economic progress. Progress which could not exist without judicial recognition and sanction. *Moragne v. States Marine Lines, Inc., et al,* 90 S.Ct. 1277 (1970).

Respondents' lament that:

> "* * * there has been an ever-broadening liability of the shipowner to an extent not dreamed of three or four decades ago. A ship may now become actionably unseaworthy while at sea as well as in foreign ports, even though it departed on its voyage in perfect condition."

has been heard before in both the courts and Congress. It is precisely such contentions which caused Judge Skelly Wright, now of the Circuit Court of Appeals for the District of Columbia to say in *Casbon v. Stockard Steamship Corporation,* 173 F. Supp., 845 (E.D. Louisiana, 1959):

> "* * * This contention, however, is not new. It simply has been dead so long counsel are unaware it was ever made. This precise argument was made, considered and rejected in Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. It should be laid back to rest for it provides no solution to the problem at hand. This problem must be dealt with upon a consideration of the warranty of seaworthiness as applied to the employee of a stevedoring contractor.

> "Despite much weeping and gnashing of teeth by interests adversely affected, the doctrine of liability without fault remains firmly embedded in the general maritime law. The extension of this doctrine, however, to cover an increasing circle of harbor workers has been arrested, at least temporarily. Moreover, there remain undecided questions concerning the application of the doctrine to transitory unseaworthiness or unseaworthiness caused by operating negligence."

It is noteworthy that Judge Wright's decision in Casbon was rendered prior to this court's decision in *Mitchell v. Trawler Racer, Inc., supra,* and of course, *Mascuilli v. United States, supra.*

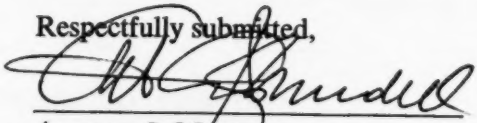
Respondent's fear of the trial court's difficulties in formulating interrogatories or articulating a charge to the jury are groundless (page 12 of Respondent's brief). We can perceive no problem in the submission of any instruction in a fact situation such as in the case at bar. Many more complicated factual circumstances giving rise to legal liability have been successfully submitted to a jury. Here the interrogatory would simply inquire whether the negligent operation by the longshoreman of seaworthy ship's equipment creates an unreasonable risk of harm. Such legal principles are neither revolutionary nor do violence to the doctrine of Stare Decisis as applied to these "pro hac vice seamen."

Neither do we find anything in Justice Harlan's decision in Moragne, supra, to warrant respondent's interpretation (Respondent's brief, page 19) of the holding in Moragne, whether it be done by paraphrasing or plagiarism. Moragne does not restrict rights, in logic and reason, it extends them.

CONCLUSION

Under the guide lines set forth in *Sieracki; Pope & Talbot v. Hawn;* and *Mascuilli* and others, the facts in the case at bar make out a case of unseaworthiness for which Respondents are liable. The decision of the Court of Appeals for the Fifth Circuit is at variance with the decisions of this Court and those of the Court of Appeals for the Second, Third and Fourth Circuits. It is therefore respectfully prayed that the decision of the Court of Appeals be reversed and the case remanded to the Trial Court for the assessment of damages, or alternatively for a trial on the merits.

Respectfully submitted,



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